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Supreme Court, U.S.
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97 1225 NOV 2 1 1997

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THOMAS BRUCE VEST,
also known as T. BRUCE VEST,
doing business as DOCTORS CLINIC,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED FOR REVIEW

I. ARE MANDATORY TIME LIMITS IMPOSED ON CROSS-EXAMINATION CONSTITUTIONAL WHEN THEY PROHIBIT THE DEFENDANT FROM ANY INQUIRY INTO MATTERS BROUGHT OUT ON DIRECT

II. WOULD THE DEFENDANT'S CONVICTION HAVE BEEN REVERSED IN THE FOURTH, FIFTH, ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS?

III. DID THE TRIAL COURT IMPERMISSIBLY PROHIBIT THE INTRODUCTION OF HIGHLY RELEVANT, PROBATIVE, EXCULPATORY MEDICAL RECORDS?

PARTIES TO PROCEEDINGS

The Petitioner in this case is Thomas Bruce Vest, also known as T. Bruce Vest, doing business as Doctor's Clinic. Dr. Vest was the Defendant in the Criminal case.

The Respondent is the United States of America, through the Solicitor General's Office.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner, Dr. Thomas Bruce Vest, respectfully files a Petition for a Writ of Certiorari to review the Judgment and Order of the United States Court of Appeals for the Seventh Circuit, which became appealable on August 25, 1997.

The Defendant was convicted of 33 Counts of Mail Fraud in the United States District Court for the Southern District of Illinois. The Defendant was allowed to remain on Bond pending his Appeal to the Seventh Circuit, based on a Trial Court finding that the Cross-Examination issue was a substantial question of law likely to result in a Reversal of the conviction. The Seventh Circuit Court of Appeals affirmed the Defendant's conviction in a printed Opinion (A1-21) on June 25, 1997. The Defendant's Petition for Rehearing was denied on August 25, 1997. (A22)

JURISDICTION

The United States Supreme Court has jurisdiction to review the Seventh Circuit Court Judgment pursuant to 28 U.S.C. §1254 (1). The Federal District Court had jurisdiction to hear the Mail Fraud Proceedings based on 18 U.S.C. §1341 which provides for exclusive District Court jurisdiction for offenses against the laws of the United States. The Appellate Court had jurisdiction under 28 U.S.C. §1291 and pursuant to 18 U.S.C. §3742 (a).

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions the accused shall enjoy the right . . . . .to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or an indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This case involves a denial of the Defendant's basic right of confrontation by the imposition of mandatory time limits on cross-examination into matters covered by the Government on direct. The mandatory time limits imposed on the Defendant's counsel effectively prohibited Counsel from any cross-examination of the key government expert medical witnesses as to many of the Counts in the Indictment.

In admitting the Petitioner to Bond initially, the District Court Judge found that there existed a substantial likelihood that the case would be reversed on appeal. Although the District Court focussed on the prohibition of cross-examination issue, the Petitioner has also consistently raised, at every level, the issue that the exclusion of relevant, probative, exculpatory patient medical records in this Medicare Fraud Case deprived the Petitioner of his Sixth Amendment Right to the Effective Assistance of Counsel and his Fifth Amendment Right to Due Process of Law.

It must be noted that this is not the usual case of mail fraud involving a doctor. Dr. Vest was not accused of being a bad doctor or committing malpractice. He was not accused of billing for tests which he did not perform. In fact, as the Trial Court noted:

> "... This was not a Trial about you being a bad, unqualified or unskilled doctor. To the contrary, with the exception of one patient, your ability and skill as a doctor was not questioned."

The Trial Judge apparently believed that the way Dr. Vest practiced medicine may be the standard of practice in years to come. He stated at the Sentencing Hearing: "You may be right. Someday we may be there. *You may be a man ahead of your time.*" (Emphasis added.)

The Government's case rested on the expert testimony of three key doctors, Drs. Rogers, Greco and Don. Dr. Rogers, the singularly most qualified expert witness who testified for the Government, gave his expert opinion as to all 36 patients and as to each of the 133 specific procedures charged in the Indictment. He testified that the testing performed by Dr. Vest on each procedure was medically unnecessary. Drs. Greco and Don each testified on direct as to twelve of the same patients.

The Trial Judge imposed mandatory time limits on the cross-examination of each of these crucial Government witnesses, tied to the length of the witnesses' direct examination. However, as the Seventh Circuit conceded in its Opinion (A12), "Vest reasonably argues that judging the adequacy of cross-examination by the length of direct examination is misleading and particularly so in this case. Whereas the Government witnesses could testify quite quickly and summarily on direct examination that the tests ordered were unnecessary, challenging that testimony symptom by symptom and test by test takes much longer."

The Court allowed the government 28 Trial days just to present the patient witnesses' testimony, and gave the government 42 of the 55 days of Trial to present their case. However, towards the end of the Government's case, and throughout the Defendant's presentation of evidence, the Court became increasingly concerned about the length of the Trial and began to be more and more vocal about the necessity of hurrying the Trial along and finishing the case. The "hurrying" came at the expense of the Defendant's Confrontation Rights.

By the time the Government began to present its expert witnesses, the Court was placing restrictions on the length, scope and method of the cross-examination. And although the Government expert witnesses testified many times that pre- and post-records would be necessary in order to render a full and accurate opinion on the necessity for medical testing, the Court precluded this line of cross-examination altogether by granting a Government Motion in Limine.

As a result of the Court's mandatory time limits, the cross-examination of Dr. Rogers, the key Government witness who testified as to all patients and all procedures, did not include 60 questioned procedures involving 16 of the 36 patients. Although these 60 procedures and 16 patients (set out as "fraudulent" in the Indictment) were covered on direct examination by the Government, the Court absolutely prohibited inquiry into these matters by Defense Counsel.

Dr. Greco testified on direct examination with regards to 12 patients, but the cross-examination of Dr. Greco was also terminated before Dr. Vest's trial counsel was able to begin any cross-examination on two of the witnesses listed in Counts of the Indictment and covered on direct. Similarly, the Court was so impatient with Defense counsel in his cross-examination of Dr. Don, that trial counsel was unable to cross-examine on two other Count Patients listed in the Counts of the Indictment and covered on direct.

Since the Government has maintained throughout all of the proceedings that the 36 different patient witnesses all involved a common scheme or plan, this apparent admission of guilt, by Trial Counsel's inability to cross-examine, infected the entire process.

The Court also precluded the Defendant from introducing highly relevant exculpatory patient records in this Medicare Fraud case. In this far-reaching opinion, the Court concluded

that patient records, admittedly material even to the government's doctors, and previously considered crucial in a Medicare Fraud case, simply were not "relevant".

During the Trial of this cause, Dr. Vest attempted to introduce patient records revealing that the patients had related the same questioned symptoms to other, unrelated, doctors both shortly before and shortly after their treatment and that objective tests showed the symptoms to be present. The Trial Court excluded this important probative exculpatory evidence.

The Trial Court was inconsistent in its rulings regarding the introduction of the crucial patient records. At first the Court would only allow the use of these records to "refresh the recollection" of an adverse witness. At one point the Court even refused to allow any questions concerning prior medical records but later changed its ruling and allowed the records to be used for "impeachment purposes only of the Count (patient) witnesses". At another time, the Court limited the admissibility of these records for impeachment allowing only the "pre-" records to be used but not the "post-" records.

The Government's expert witnesses admitted that the pre- and post-medical records could change their opinions as to the medical necessity of the testing. However, the Court barred any reference or arguments based on the post- Doctors Clinic record and barred cross-examination of these experts based on the pre- and post- records. And although the Court of Appeals believed that these crucial records were introduced on "Summary Charts", this belief was erroneous as the pre- and post- records were also excluded from the Summary Charts.

THE OPINION BELOW

In their Opinion, The United States Court of Appeals admitted that "Dr. Thomas Bruce Vest is, by all accounts, not your ordinary medical doctor. Vest is both an Internist and a Radiologist - an unusual combination in the field." (A1)

The District Court allowed Dr. Vest to remain free on Bond due to the serious implications of the Defendant's Confrontation Rights involved in the decision to prohibit the Defendant from cross-examining into matters charged in the Indictment and brought out by the Government on direct. The Seventh Circuit acknowledged that the Confrontation Clause is implicated in this decision, and that they broke new ground: "Our concern about time limits is even greater in a criminal case where a Defendant's Confrontation Clause rights may be threatened by an arbitrary cutoff of cross-examination." (A12)

The mandatory time limits made it impossible for the Defendant to cross-examine the key prosecution medical experts on matters indisputably relevant. These matters were charged in the indictment and brought out on direct.

Furthermore it is undisputed, as the Seventh Circuit noted, that ". . .the District Court prohibited Vest from using the patients' pre- and post- visit medical records during the cross-examination of the Government's Experts." (A3) It is also undisputed that the District Court prohibited the cross-examination of the experts with the records and instructed the Jury "that the records were admissible only for impeachment of the patients." (A6)

The Opinion below failed to address a central issue raised by the Defendant: That the records were admissible as *substantive* evidence, and not merely for the limited purpose of impeachment of the patient witnesses. The government's own expert witnesses admitted that the records might change their opinions as to the "medical necessity" of the challenged procedures.

The critical "false symptoms" element of the Prosecution's case was fatally flawed and the introduction of this exceptionally objective exculpatory evidence would have resulted in an acquittal of the Defendant.

One error compounded the other. Allowing the key Government witness, who testified as to all 36 counts, to testify on direct without effective cross-examination that, since the symptoms were false, the tests were unnecessary and fraudulent, the Trial Judge effectively tried and lost the Defendant's case based on an unconstitutional mandatory time limit on cross-examination. Adding to this error, the Court prohibited the introduction of highly relevant, probative exculpatory evidence.

REASONS FOR GRANTING THIS PETITION

I. THE PETITIONER'S CONFRONTATION RIGHTS WERE VIOLATED WHEN THE TRIAL COURT IMPROPERLY PROHIBITED CROSS-EXAMINATION INTO MATTERS BROUGHT OUT BY THE GOVERNMENT ON DIRECT.

The prohibition of cross-examination of government expert witnesses into matters covered on direct violated Petitioner's Constitutional Rights to confront the witnesses and evidence against him. This is a substantial Constitutional Right, now destroyed by a novel ruling of the Seventh Circuit Court of Appeals. This ruling is in direct conflict with the law of at least four other Circuits: the Fourth, Fifth, Eleventh and District of Columbia Circuits.

Mandatory time limits, imposed on indisputably relevant cross-examination in a criminal case, have never before been approved by any Court. This novel ruling, eliminating important cross-examination rights and in conflict with established law, should be reviewed by the United States Supreme Court.

There are few subjects, perhaps, upon which the Supreme Court and other Courts have been more nearly unanimous than in their expression of belief that: "The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v *Texas*, 380 U.S. 400, 405 (1965). Cross-examination "...is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore Evidence, Section 1367, Chadbourn Rev., 1976. The Right of Cross-Examination is one of the safeguards essential to a Fair Trial. *Alford* v *U.S.*, 282 U.S. 687, 692 (1931).

The United States Supreme Court has "...consistently emphasized the necessity for cross-examination as a protection for

Defendants in a criminal case. In *Kirby* v *U.S.*, 174 U.S. 47, 55, 56 (1899), the Court referred to the right of confrontation as 'one of the fundamental guarantees of life and liberty' and 'a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative *and judicial* actions by provisions of the Constitution of the United States and in the Constitution of most, if not all, of the States composing the Union.' " *Pointer* v *Texas*, 380 U.S. 400, 404. (Emphasis added.) The right of confrontation has ancient roots and the Supreme Court "...has been zealous to protect these rights from erosion." *Greene* v *McElroy*, 360 U.S. 474, 496-497 (1959).

The law set out in this case now permits a Trial Judge to absolutely prohibit a defense lawyer from cross-examining key Government witnesses in areas brought out on direct examination and critical to the determination of guilt or innocence. Never before in any criminal case has the prohibition of cross-examination into matters covered on direct by a key Government witness been approved. In fact, had this case been tried in the Fourth, Fifth, Eleventh or District of Columbia Circuits, it would have been reversed.

Cross-examination is a matter or right, not permission. *Alford* v *U.S.*, 282 U.S., at page 691. In *Alford*, as here, "the Trial Judge cut off, *in limine*, all inquiry on a subject with respect to which the Defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error." *Alford* v *U.S.*, 282 U.S., at page 694.

Here, as in *Alford*, it cannot be questioned that the Defendant was entitled to cross-examine the expert witnesses as to crucial maters charged in the Indictment and covered by the Government on direct examination. The *Vest* opinion is in direct conflict with the precedent as set out in *Alford*.

As the Seventh Circuit Court noted, and as the Defendant concedes, District Courts do have discretion to limit cross-

examination. (A11) However, the discretion to limit cross-examination is not the same as the power to *prohibit* the cross-examination into matters covered on direct. Contrary to the novel ruling in *Vest*, as many Courts have previously held, it is only *after* the Right of Cross-Examination has been substantially and thoroughly exercised that the allowance of further cross-examination becomes discretionary with the Trial Court, *U.S.* v *Caudle*, 606 F.2d 451, 458 (4th Cir., 1977).

The District Court could perhaps have restricted the *scope* of the examination of witnesses as to certain Counts, symptoms, or procedures as they were being covered on cross-examination. It could have directed the inexperienced Trial Counsel to move on when questioning became repetitious or irrelevant. However, the Court committed grievous and substantial Constitutional error when it absolutely prohibited inquiry into matters covered on direct. The error here was even more grievous because the only reason given by the Court for prohibiting the cross-examination was the time being consumed in the defense of the accused.

The remedy fashioned by the District Court and approved by the Seventh Circuit is a harsh and unnecessary remedy indeed. The Right of confrontation is probably the most fundamental and important right in a criminal trial. Without the right of cross-examination, a criminal trial in this country would become nothing more than a Star Chamber proceeding with the Government presenting evidence and the Defendant being convicted, in effect, without Trial.

There existed other reasonable and constitutionally sound methods for assuring that the Trial would move forward, yet securing to the Defendant his fundamental right to confront and cross-examine the witnesses against him.

The Court had two constitutional remedies to reduce the length of the Trial: it could have limited the number of Govern-

ment witnesses by allowing, at least in part, the Defendant's Motion to Sever; or, alternatively, it could have prohibited further cross-examination as to individual procedures once the Defendant's Counsel had a sufficient and reasonable opportunity to pursue that procedure. In that fashion, the Court could have accommodated both the need to move the Trial along and the right of the Defendant to confront the witnesses and evidence against him.

Instead of choosing one of the constitutionally permissible remedies, the Court chose to deprive the Defendant of his Constitutional right to cross-examination of the Government's key expert witnesses as to matters covered on direct. Given the choices available to the Court, the Court chose the one which was constitutionally impermissible. The Defendant's right to confront the witness and evidence against him, as guaranteed to him under the Fifth and Sixth Amendments to the United States Constitution, was severely, substantially and needlessly violated. Furthermore, this ruling drastically changes the criminal law in the United States as it has existed for nearly 200 years.

When the Seventh Circuit Court of Appeals prohibited the cross-examination in this case, by imposing mandatory time limits, it began to sail on uncharted waters in one of the most constitutionally sensitive seas known in American Jurisprudence. A Court simply does not have the discretion to *prohibit* cross-examination of a witness in an area specifically covered by the Government on direct examination. No other Court has approved mandatory time limits for cross-examination in a criminal case; most Circuits have disapproved. At least four other circuits would have reversed the conviction in this case.

To allow this precedent to stand is to dam up the essence of a Fair Trial in the United States and to irrevocably damage the greatest legal engine ever invented for discovery of truth - - the right of cross-examination. The Seventh Circuit stands alone, at

odds with at least four other Circuits, in approving mandatory time limits for cross-examination in a criminal case.

This case must be reversed because the imposition of mandatory time limits on cross-examination denies a Defendant his right to cross-examination, due process and the effective assistance of counsel.

II. THE FOURTH, FIFTH, ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS WOULD HAVE REVERSED THE DEFENDANT'S CONVICTION.

In *U.S.* v *Caudle*, 606 F.2d 451, the Fourth Circuit reversed a criminal conviction on facts indistinguishable from the case at bar. The Court there held that the Trial Court's discretionary authority to limit cross-examination comes into play only *after* there has been permitted, as a matter of right, sufficient cross-examination to satisfy the Sixth Amendment, *Caudle*, at page 459.

> "All issues concerning cross-examination should not melt away upon invocation of the Trial Judge's discretion...The Trial Judge's discretion insulates only his decision that an area of cross-examination has been *sufficiently* explored and that further inquiry would be pointless...An Appellate Court is called upon to review a ruling which *foreclosed altogether* a valid area of cross-examination."

U.S. v *Jordan*, 466 F.2d 99, 105 (4th Cir., 1972)." *Caudle*, 606 F.2d at page 1459 (emphasis in original).

The Fifth Circuit has similarly held contrary to the new holding by the Seventh Circuit Court of Appeals in *Vest*. In *U.S.* v *Mayer*, 556 F.2d 245, 250 (5th Cir., 1977), a criminal conviction was reversed:

> ". . . because the District Court did not allow the Defense sufficient inquiry into the motivation of the prosecution's

> chief witness in testifying, and consequently frustrated Mayer's attempts to fully exercise his Sixth Amendment Rights, the Trial Judge never reached a point at which he had the discretion to limit the extent of cross-examination."

The Mayer court noted that, even though the scope of cross-examination is within the discretion of the Trial Judge, this discretionary authority to limit cross-examination comes into play only *after* there has been permitted, as a matter of right, sufficient cross-examination to satisfy the Sixth Amendment.

In *Mayer*, the defendant's conviction was reversed despite the fact that the subject of cross-examination was arguably irrelevant. Here, the prohibited cross-examination was indisputably relevant. The Fifth Circuit would certainly have reversed *Vest*, based on the improper prohibition of relevant cross-examination.

The Eleventh Circuit has also acknowledged the importance of full cross-examination, particularly when, as in the case at bar, the witness the accused seeks to cross-examine is an important Government witness providing an essential element in the prosecution's case. *U.S.* v *Calle*, 822 F.2d 1016 (11th Cir., 1987). In reversing Calle's conviction, the Court noted that the importance of full cross-examination is necessarily increased when the witness the accused seeks to cross-examine is an important Government witness.

Here, as in *Calle*, the witness in question was a key government witness. The Eleventh Circuit would have reversed the instant conviction because here the Trial Court refused to allow *any* cross-examination into indisputably relevant areas of a key witness. See also *U.S.* v *Battista Rodriquez*, 17 F.3d 1354 (11th Cir., 1994), which reversed a criminal conviction holding that the Defendant was deprived of his Constitutional right to cross-examine an important Government witness when the Court prohibited Counsel from asking an FBI agent witness any

question about the contents or the existence of a classified document. In *Rodriquez*, again, the cross-examination was arguable irrelevant. Here, the cross-examination was indisputably relevant.

Concurring with the Fourth, Fifth, and Eleventh Circuits, the District of Columbia Circuit has also held that the Trial Court simply does not have the same discretion in *prohibiting* the cross-examination of a witnesses as it does in curtailing the impeachment of a witness on a collateral issue. The Trial Judge cannot restrict the right of cross-examination by the Defense on matters brought out before the Jury on direct examination until that right has been substantially and fairly exercised. *U.S.* v *Pugh*, 436 F.2d 222, 225 (D.C. Cir., 1970). The Pugh Court held that it is only "...if cross-examination of a witness has been extensive, repetitive and protracted or if defense counsel has succeeded in bringing out several discreditable matters that further questioning along the line would be merely cumulative..." that a cutoff of questioning is justified, (*Pugh*, 436 F.2d, at page 224). Clearly, the prohibition of *any* questions concerning matters covered on direct, as occurred here, would result in a reversal in the District of Columbia Circuit.

The testimony of the Government's medical experts in this case was so bewildering to a common Jury and the case so complex (involving 36 patients and 133 complicated medical procedures) that it would be virtually impossible for the Jury to do anything but rubber-stamp the Government's experts' conclusions, provided that they were not substantially refuted. The inability to cross-examine key witnesses could have been taken by the Jury to mean that the Defendant, in fact, had no cross-examination or refutation as to those procedures. The failure to question Drs. Rogers, Don and Greco resulted in an almost irrefutable admission of guilt. When the Trial Court refused to allow the Defense the latitude to cross-examine the key Government's witnesses on each questioned test and each Count

witness, the Trial sealed the fate of the Defendant without resort to "the greatest legal engine ever invented for the discovery of truth."

The Fourth, Fifth, Eleventh and District of Columbia Circuit Courts of Appeal would have reversed Dr. Vest's conviction in this case.

III. WHEN THE TRIAL COURT IMPERMISSIBLY PROHIBITED THE INTRODUCTION OF HIGHLY RELEVANT, PROBATIVE, EXCULPATORY EVIDENCE, IT COMPOUNDED THE CROSS-EXAMINATION ERROR. THIS CONVICTION WOULD HAVE BEEN REVERSED IN AT LEAST FOUR OTHER CIRCUITS.

The Government's main theory in this case was that the Defendant listed false medical symptoms in the patient's medical records for the purpose of justifying the performance of expensive medical testing. It was a critical element of the Government's case that the patients did not relate the symptoms that were set out in Dr. Vest's medical records. According to a Pre-Trial Government Brief, without these alleged "false symptoms" there was no crime. The criminality of Dr. Vest thus turned on whether or not the alleged "false symptoms" were true.

During the Trial, the objective pre- and post- medical records of the patients, as well as the objective test results proving that the symptoms did exist and that the patient's memory was faulty, were a central issue and highly relevant to the outcome of the case. Without the false symptoms, there was no criminal intent but merely a difference of opinion among doctors as to what tests should be run under the circumstances. (Assuming, arguendo, that the Jury could have convicted Dr. Vest even if the "false symptoms" were true, the improper prohibition of cross-examination of the key government witnesses deprived the Defendant of any chance to prove his innocence. Without the crucial patient

records, and without the right to cross-examine the government witnesses, the Defendant had no chance to prove that his procedures were proper.) The objective exculpatory evidence constituted the means by which Dr. Vest sought to establish a fact which was vital to his defense.

In this Medicare Fraud Case, it is incredible that the Court refused to accept objective, verifiable evidence that the disputed symptoms existed. If the disputed symptoms did exist, the Defendant Doctor could have shown that the procedures were "medically necessary" to treat the illness. And since the "medical necessity" of procedures has now become a key battleground between Medicare providers, who pay the bills, and Doctors, who provide the services based on symptoms, the instant ruling has nationwide impact. If "medical necessity" is to be determined without resort to actual patient records and histories, Doctors throughout the country will be hard pressed to defend themselves against similar charges in the future. The exclusion of highly relevant patient records, in a Medicare Fraud Case which turns on "medical necessity," has an enormous national impact. The ruling in this case excluding these records and restricting cross-examination may well dictate the ground rules for all future Medicare Fraud Cases brought against America's Doctors. This ruling must be scrutinized and reversed by the Supreme Court.

Circumstantial evidence plays an important part in the determination of the intent of the Defendant, and all circumstances that throw light upon that subject, either directly or indirectly, should be received in evidence on behalf of both the Government and those charged with a crime. *Wood* v *U.S.*, 41 U.S. 342, 10 L.Ed 987, cited with approval in *Norcott* v *U.S.*, 65 F.2d 913, 919 (7th Cir., 1933).

"Evidence that increases the likelihood of a fact sought to be proved is probative of that fact, by definition." *U.S.* v *Marks*, 816

F.2d 1207, 1212 (7th Cir., 1987). In the *Marks* case, the Court commented that "...the probative value of evidence often hinges on its being part of a mosaic." (*Marks*, 816 F.2d,at page 1212). Complaints made shortly before and shortly after an event provide the total picture and circumstantially prove that fact at the time of the event.

U.S. v *Pollard*, 790 F.2d 1309, 1312, (7th Cir., 1986) is directly opposite to the *Vest* opinion. There the Court developed the definition of relevance adopted under Rule 401 and stated that it is "...an expansive one, and for evidence to be relevant under this definition, it need not conclusively prove the ultimate fact in issue, but only have any tendency to make the existence of any fact which is of consequence to the determination of the action more or less probable than it would be without the evidence....Even if the proposition for which it is offered still seems improbable after the evidence is considered, the proffered evidence is not necessarily irrelevant."

The function of a criminal trial is to determine the truth or falsity of the charges brought against the Defendant. The proper fulfillment of that function requires all relevant evidence to be admitted. *Lopez* v *U.S.*, 373 U.S. 427, 10 L.Ed.2d 462, 471 (1963). The exclusion of relevant evidence on an issue central to the offense constitutes reversible error. *U.S.* v *Pollard*, 790 F.2d, at pages 1313-14. Pre- and post- medical records were admissible as substantive evidence of the lack of criminal intent on the part of Dr. Vest. The exclusion of this exculpatory evidence denied him effective assistance of Counsel, and compounded the error committed when the Court prohibited any cross-examination into matters brought out on direct.

CONCLUSION

The Trial Court improperly prohibited the cross-examination of key Government witnesses into maters covered on direct. To compound this error, the Trial Court also prohibited the introduction of highly relevant and probative exculpatory defense evidence. The cross-examination error was highly prejudicial to the Defendant, particularly in light of the other errors alleged.

The United States Supreme Court, as well as the Fourth, Fifth, Eleventh and District of Columbia Circuits have all held contrary to the ruling in the Vest Opinion. The Seventh Circuit's resort to a novel and unique definition of "the reasonable chance to pursue matters covered on direct" (A14), significantly diminishes, if not extinguishing altogether, the vitality of the Confrontation Clause. If allowed to stand, the new law pronounced by the Seventh Circuit will allow Trial Judges to prohibit any cross-examination into critical matters of evidence covered by the Government in their case if the Defense Lawyer violates the Trial Judge's sense of time. Surely, a 55-day Trial should have had a few extra hours to allow the defense to cross-examine critical Government witnesses on matters brought out on direct, so that the Defendant's rights under the Confrontation Clause could be exercised.

The Defendant's conviction would have been reversed had he been tried in the Fourth, Fifth, Eleventh or District of Columbia Circuits. The Jury was never allowed to hear the cross-examination of key Government expert witnesses concerning all Counts of the Indictment. The Jury was prohibited from using the pre- and post- records as substantive evidence of the innocence of the Defendant. The Defendant simply did not get a Fair Trial, because the Court violated one of the most basic rights in a criminal trial - the Right of Confrontation.

When the Trial Court Judge impermissibly prohibited the Defendant from proper cross-examination into matters brought

out on direct, the Court directly and significantly denied the Defendant his Confrontation Rights. This novel and unique ruling, which is contrary to the rulings of the Fourth, Fifth, Eleventh and Circuit Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted

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